Oil, Chemical and Atomic Workers International Union, Local 2-947 (Cotter Corporation) *and* **Joseph J. Ceremuga.** Case 27-CB-1895

22 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 19 January 1984 Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We adopt the judge's findings that the Respondent did not, as alleged, violate Section 8(b)(1)(A) of the Act by refusing to proceed to arbitration on Joseph Ceremuga's grievance or by certain remarks that its union steward made while handling the grievance. The judge also found no violation in the threat of bodily harm which the Respondent's president, James Wilkins, made to Ceremuga. For the reasons set forth below, we find merit in the General Counsel's exceptions to this last finding of the judge.

The record evidence shows that, after the Respondent's grievance committee voted against taking Ceremuga's grievance to arbitration, Wilkins phoned the grievant to inform him of the decision. During the lengthy conversation that ensued, Wilkins alluded to Ceremuga's lack of union membership while Ceremuga vigorously argued that his grievance had merit. They also discussed the unfair labor practice charge which Ceremuga previously had filed against the Respondent and which he had later withdrawn. Ultimately, both speakers' tempers flared, whereon Wilkins admittedly threatened to come over and "slam-dunk" Cereguma's face. According to Ceremuga, this threat was made after he announced his intention of filing a new charge. Wilkins stated, by contrast, that it was Ceremuga's abusiveness toward him which provoked these remarks and that he had prefaced them with the statement that they were completely divorced from his role as the Respondent's president. The judge found that the "slam-dunk" remark was an isolated utterance, strictly personal, and tempermental in nature which does not warrant the finding of a violation.

Contary to the judge, we find that Wilkins' threat unlawfully restrained and coerced Ceremuga in his right to use the Board's processes. Wilkins admitted at the hearing that Ceremuga's earlier Board charge was discussed in their conversation. More critically, Ceremuga testified, as noted, that he mentioned filing a new charge after Wilkins informed him that the Respondent was dropping his grievance. Although the judge did not fully credit Ceremuga's testimony regarding this conversation, we note that Ceremuga was not specifically discredited on this point. Based on the circumstances present here, we find that the logical inference is that Ceremuga's reference to filing a new charge provoked Wilkins into threatening him with physical violence. There is no other reasonable explanation for Wilkins' action. Accordingly, we find that the Respondent violated Section 8(b)(1)(A) of the Act by engaging in such conduct.[1]

THE REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

CONCLUSIONS OF LAW

1. Cotter Corporation is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] See, e.g., *Petersburg Associates*, 239 NLRB 1091, 1104 (1979).

Although we reverse the judge in this one respect, we note that the finding of a violation in Wilkins' phone threat is insufficient to affect our conclusion that the Respondent was not motivated by invidious considerations in abandoning Ceremuga's grievance. It was Herbert "Bill" Rowe, a union steward, and not Wilkins who had been the Respondent's official primarily responsible for handling the grievance. Rowe clearly was sympathetic toward the Charging Party's case. Wilkins' role was limited to directing the grievance committee meeting on the subject in the absence of the committee chairman. He is not a member of that committee and had no vote in the matter. Furthermore, we agree with the judge's finding that the Respondent acted reasonably and in good faith when it decided that Ceremuga's grievance was lacking in merit and should not be taken to arbitration. Thus, the Respondent properly evaluated the likelihood of success—which it considered minimal—against the cost of arbitration, at a time when the Respondent had limited resources. The Respondent had $441 in its treasury to pay for an arbitration that would cost about $650. Finally, it is noteworthy that the Respondent had successfully arbitrated another nonmember's grievance the year before Ceremuga was discharged. Thus, we find that the Respondent acted reasonably and did not discriminate against Ceremuga in refusing to proceed to binding arbitration. Accordingly, we affirm the judge's finding that the Respondent did not violate Sec. 8(b)(1)(A) of the Act by abandoning Ceremuga's grievance. In reaching this conclusion, we find it unnecessary to rely on the judge's citation of various arbitration cases, since there is no evidence that they played a role in the Respondent's decision concerning the processing of the grievance.

2. Oil, Chemical and Atomic Workers International Union, Local 2-947, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening an employee with physical harm for indicating that he planned to file charges with the Board, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Oil, Chemical and Atomic Workers International Union, Local 2-947, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees with physical harm for indicating that they plan to file unfair labor practice charges with the Board.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at all its offices and union halls copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 27 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Promptly after receipt of unsigned copies of said notices from the Regional Director, return to him a sufficient number of signed copies for posting by Cotter Corporation, if the latter is willing, at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

[2] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with physical harm for indicating that they plan to file unfair labor practice charges against us with the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 2-947

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried at Denver, Colorado, September 1 and 2, 1983.[1] The charge was filed by Joseph J. Ceremuga on March 30 and complaint was issued May 17. The primary issue is whether Oil, Chemical and Atomic Workers International Union, Local 2-947, called the Union, has violated Section 8(b)(1)(A) of the National Labor Relations Act by failing to adequately represent Ceremuga and process a grievance to arbitration concerning his discharge from employment by Cotter Corporation.

On the entire record, including my observation of the demeanor of witnesses, and after consideration of briefs filed by the General Counsel and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Cotter Corporation has a principal office and place of business at Lakewood, Colorado, and operates a uranium mine at Golden, Colorado, where it annually ships goods

[1] All dates hereafter are in 1983, unless otherwise indicated.

valued over $50,000 directly outside that State. As admitted I find it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

The parties have a collective-bargaining agreement which contains express management rights, a grievance and arbitration procedure leading to binding resolution of disputes, and a checkoff clause for employees electing membership in the Union. Cotter's Schwartzwalder Mine is the facility involved in this proceeding. Management personnel there include Superintendent Mary Murray, Foreman Bill Pierce, and Paul Hazdra as a first-line supervisor, titled shifter. James Wilkins is union president, while Vice President Donald DuVall also serves as chairman of a six-member grievance committee.

Ceremuga had worked since January 1982 as a miner trainee. For about the last 5 months of 1982 his regular assignment was a bonus partnership system with employee Andy Patterson doing underground work. Ceremuga had also occasionally worked at surface ore sorting on a main tram. Such an assignment materialized on both December 29 and 30, 1982, when Patterson was off ill. The unexpected change caught Ceremuga without sufficient warm clothes for such outdoor winter work, and he obtained some from the company safety director on the second day after telephone contact with the Mining Safety and Health Administration. A 3-day holiday shutdown followed, yet Patterson was not back to work by the first Monday's reopening. On January 3 Ceremuga worked underground, and on January 4 was assigned the tram again after Hazdra had advised him it was likely, which allowed him to dress for the assignment.

Patterson returned to work on January 5; however Hazdra assigned him to leyner work with another experienced employee and directed Ceremuga to work the main tram again. Ceremuga protested that this was discriminatory and unfair, but Hazdra insisted on the assignment suggesting that Ceremuga file a grievance. He was unwilling to work again in cold weather and left the mine site. Hazdra immediately placed him on suspension for insubordination, and the next day grievance number 179 was filed on his behalf by Steward Herbert (Bill) Rowe. Ceremuga testified, without contradiction, that Rowe soon remarked to him about certain employees, themselves members of the Union, having implied that this grievance of nonmember Ceremuga could be blown, which Rowe assured he would not do because it was unlawful.

A step-one grievance meeting on January 10 was unavailing, and the matter advanced to step two conducted on January 13. Here Rowe raised the situation of employee Bud Johnson's once having engaged in a similar infraction without being terminated, which management agreed to consider. Ceremuga testified that on leaving the meeting Rowe stated that the grievance would go easier for a member of the Union. Rowe conceded making the basic remark, credibly adding that he had said it was not an obligation for grievance handling. Upon this Ceremuga promptly signed a checkoff authorization for processing.

At step 3 on January 20 steward Dean Augenstein replaced vacationing Rowe. By this time Ceremuga had freely admitted to hot-headed behavior on January 5. It was also known that Murray had previously contrived an offensive ethnic joke, and made an apology after Ceremuga complained to Duane Dughman, Cotter's vice president for administration. This meeting brought no change to pending discipline, leaving Ceremuga dismayed about Augenstein having, by word and deed, treated the case as "cut and dried" against him.

At step 4, on January 31, union representatives again argued the case with Ceremuga present. However Mine Manager Donald Little wrote them on February 3 to say that the company distinguished the Bud Johnson episode (as to which Rowe had requested written details), and that it believed the suspension was justified in light of flagrant insubordination before other employees. The following day General Mine Manager Robert Hedlund notified Ceremuga that he was terminated.

Ceremuga had filed an unfair labor practice charge against the Union on January 26, basing this on an assertion of unfair representation because of his nonmembership. After Wilkins and Rowe jointly signed an arbitration request, Ceremuga withdrew the pending charge on February 15. The matter was then considered by the Union's grievance committee on March 19 with Wilkins chairing this meeting in the absence of DuVall. After deliberating, the committee voted 5 to 1 not to arbitrate, and Wilkins telephoned Ceremuga to so advise him. A long conversation ensued in which Wilkins alluded to Ceremuga's lack of membership, while the latter contended his case had merit. The conversation became increasingly peevish, until Wilkins finally said he might "slam-dunk" Ceremuga's face. They soon hung up on each other and a few minutes later, at Wilkins' request, Union Secretary-Treasurer Dan McMahan telephoned Ceremuga to ask his address for the purpose of mailing an invitation to the next membership meeting.

At the next such meeting on April 13 the body voted not to arbitrate Ceremuga's grievance. Remarks in this proceeding included those noting that he was not a member. In fact, Ceremuga's signed checkoff authorization of January 14 was unprocessed by the time its purpose became futile when a company payroll functionary noted his termination.

B. *Analysis*

The standard for determining whether a labor organization has unlawfully failed to carry a grievance through final dispute resolution is stated in *Glass Bottle Blowers Local 106 (Owens-Illinois)*, 240 NLRB 324 (1979). The rule is that, once a grievance becomes undertaken, its abandonment, short of arbitration, is evaluated as an 8(b)(1)(A) issue in terms not of intrinsic merits of the claim but, rather, whether the union's disposition of such grievance was perfunctory or motivated by ill will or other invidious considerations. Where animus is not present, the question that remains is whether grievance handling was merely perfunctory and thus a violation of

the duty of fair representation to employees. The Board terms a "well settled" statement of the principle to be that written in *Service Employees Local 579 (Beverly Manor)*, 229 NLRB 692 at 695 (1977):

> So long as [a Union] exercises its discretion in good faith and with honesty of purpose, a collective-bargaining representative is endowed with a wide range of reasonableness in the performance of its duties for the unit it represents. Mere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation.

Here the situation is that of a small local with a treasury of $441 to weigh against financing a formal arbitration in which any outcome would require equal sharing costs. In at least one prior case a nonmember's grievance was arbitrated, and successfully so, while no convincing evidence is present to show that Ceremuga's membership status was an actual factor. Neither Rowe's passing on of what others said to him, nor Wilkins' bullying threat made from the Augenstein home while probably inebriated, truly revealed the dynamics involved. I credit Ceremuga's testimony as to several essentials of the Wilkins conversation; however, this does not address the fact that other members of the grievance committee imparted their own independent, good-faith appraisal of the case. This also applies to the membership meeting itself where the final decision to leave Ceremuga without contractual redress was founded exclusively on reasons within the proper discretion of a local union's constituency. The earlier written binding over of the case to arbitration was merely a tactical move to avoid exceeding jurisdictional time limits set forth in the contract.

It cannot be gainsaid that the current state of "fair representation" doctrine has but complicated the always delicate job of evaluating worker grievances. It also has been authoritatively noted that conflicting claims among types of employees "can be a source of real difficulty for union leadership in grievance handling," and that this "political burden," coupled with "current stress on individual rights," has made even more difficult "the unpleasant duty of screening out grievances that lack contractual merit." Harold W. Davey, *Contemporary Collective Bargaining* 3d edition, Prentice Hall, Inc. (1972), at 149–150. The principle involved has been broadened upon by observation that the right to fair representation "does not, for example, include a right to have one's grievance go all the way to arbitration, regardless of its contractual merit," and that "*it is the contract* that must become the decisive consideration in further processing of a grievance, rather that the personal whims of an individual worker" (emphasis added).

The reality is that a fact situation as here presented would have scant likelihood of success. While this appraisal is a collateral one under *Glass Bottle Blowers*, it does relate to the germane question of whether the Union acted with mere perfunctory disdain or with an awareness of their free-floating obligation to represent employees. Ceremuga had freely admitted to the essentials of an insubordinate act and no precedent was available for the Union to effectively argue inconsistency of treatment by the Employer. The general arbitration process is rife with examples of how circumstances of this type might fare. In *Eastern Consolidated Coal Co.*, 66 LA 162 (M. Lubow), a mine worker was found properly disciplined for insubordination after refusing to move four 50-pound rockdust bags on a wheelbarrow after he had previously moved eight bags of the same weight. In *Kohler Co.*, 62 LA 1148 (V. Chaffin), the arbitrator found an employer had properly discharged a 14-year worker for refusing to perform a new task in partnership arrangement with two of his coworkers, despite the refusal being based on fear of aggravating a preexisting back injury. In *Celotex Corp.*, 52 LA 1187 (N. Cayton), a 12-day suspension was found justified where an employee refused a snow shoveling assignment by claiming recovery from flu, where, in actuality, he was merely following a coworker's example. In *Minnesota Mining & Mfg. Co.*, 59 LA 375 (J. Silver), an employer was found justified in discharging an electrician who refused the foreman's order to change generator brushes located on the plant roof during cold weather and who left the premises immediately thereafter without obtaining permission. In *United McGill Corp.*, 79 LA 327 (T. Dyke), the arbitrator found an employer to have properly discharged the senior member of a two-man sandblaster team who refused after three orders to complete 1-1/2 hours of shift, saying it was the junior member's turn to do the job and not his pursuant to a work arrangement between management and the team. These illustrations, coupled with a lack of sufficient evidence to show that membership considerations influence the Union's decision, plus that it was financially ill-prepared for the likely cost of an arbitration proceeding, leave the decision to drop Ceremuga's case a not unreasonable one within the intendment of *Beverly Manor.*

A final assessment concerns the statements in January and March by Rowe and Wilkins, respectively, which are present in the case as alleged violations of Section 8(b)(1)(A). I first observe that Rowe was the one person of authority within the Union showing genuine sympathy toward Ceremuga and a dogged belief in his cause. However Rowe's actual remarks, as embodied in allegations of subparagraphs (c) and (d) to paragraph V of the complaint, are, in my view, informative and not coercive as a matter of law. To state that an unworthy suggestion has been renounced and to comment passingly about a natural affinity relationship is a common, expectable form of dialogue in an employment setting in which membership in the collective-bargaining agent is not compulsory. The allegations against Wilkins, as grounded in subparagraphs (a) and (b) of paragraph V, have a different infirmity. I cannot credit Ceremuga in full respecting the content of remarks made over the telephone while Wilkins was "babbling," sounding "drunk," and "slurred" of speech. I find the facts to be that Ceremuga dismayedly accused Wilkins of harboring bias against nonmembers and in the extended conversation to follow this belief was not effectively dispelled by words. That is a more persuasive composite of testimony from both participants, and leaves subparagraph (a) lacking in suffi-

cient proof. The "slam-dunk" remark was tacitly admitted by Wilkins, however, this isolated utterance, strictly personal and temperamental in nature, does not merit an unfair labor practice finding.

I accordingly render a conclusion of law that the Union has not failed to accord Ceremuga full and fair representation in considering whether or not to carry his grievance to arbitration, nor has it otherwise violated the Act.

[Recommended Order for dismissal omitted from publication.]